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679236—63——1

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. ———

UNITED STATES OF AMERICA, APPELLANT

v.

EL PASO NATURAL GAS COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

JURISDICTIONAL STATEMENT

OPINION BELOW

The district court rendered no opinion. Its findings of fact and conclusion of law (App., *infra*, pp. 34–67) are not reported.

JURISDICTION

On November 20, 1962, the district court entered judgment, after trial, dismissing the government's complaint. The United States filed a notice of appeal on January 18, 1963. The jurisdiction of this Court to review that judgment on direct appeal is conferred by Section 2 of the Expediting Act, 32 Stat. 823, as amended, 15 U.S.C. 29. *United States* v. *E. I. du Pont de Nemours*, 366 U.S. 316; *United States* v. *Dicbold, Inc.*, 369 U.S. 654.

QUESTION PRESENTED

Whether the district court erroneously held that the acquisition by El Paso Natural Gas Company, a large natural gas pipeline company, of Pacific Northwest Pipeline Corporation, the only other major pipeline then operating west of the Rocky Mountains, would not substantially lessen competition (a) in the distribution of natural gas in California, and (b) in the acquisition of natural gas in the San Juan Basin and the Rocky Mountain area, in violation of Section 7 of the Clayton Act.

STATUTE INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 64 Stat. 1125, 15 U.S.C. 18, provides in relevant part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT

This is a direct appeal from a final judgment entered after trial, dismissing the government's complaint in an antitrust suit charging violation of Section 7 of the Clayton Act. The complaint alleged that the merger of two natural gas pipeline companies, El Paso Natural Gas Company ("El Paso")

and Pacific Northwest Pipeline Corporation ("Pacific Northwest"), would substantially lessen competition in the exploration for, and the production, purchase, and sale of natural gas.[1] The evidence introduced at the trial—consisting mainly of documents and transcripts of administrative proceedings in which relevant testimony had been given—was largely undisputed, and disclosed the following underlying facts:

A. THE FACTS

1. *The companies involved.* El Paso, incorporated in 1928, was operating, at the time of the merger, an integrated and inter-connected pipeline system of over 6,700 miles. It purchases, and also produces, natural gas in oil and gas fields located in the Permian Basin in southeastern New Mexico, the Panhandle Field in Texas and Oklahoma, and the San Juan Basin in New Mexico and Colorado. The gas is then transported through its pipeline, or some portion of it, and sold to the public for domestic, commercial and other uses. Although some sales are made directly to industrial consumers and to cities and towns along the route of its pipeline, the bulk of its sales are

[1] The agreement leading to the merger contemplated an exchange of stock and El Paso acquired 99.8 percent of the shares of Pacific Northwest. After the institution of the antitrust proceedings, El Paso applied to the Federal Power Commission for permission to acquire the assets of Pacific Northwest, pursuant to Section 7(c) of the Natural Gas Act (15 U.S.C. 717f(c)). After the Commission authorized the asset acquisition (later set aside by this Court in *California* v. *Federal Power Commission*, 369 U.S. 482), the United States moved to amend the complaint so as to include the asset acquisition in the Clayton Act violation. This motion was granted on October 19, 1962.

to distribution companies which resell the gas in California, Nevada, Texas, New Mexico, and Arizona. Through its subsidiary, Utah Natural Gas Company, El Paso also sells gas for ultimate consumption in Salt Lake City and surrounding areas in Utah (Complaint, par. 6; El Paso Answer, par. 6). In transmitting and selling gas, El Paso is not a common carrier; it is under no obligation to transport gas for anyone and seldom transports gas which it does not itself own (Kayser, Tr. 214–215).[2] In the year preceding the stock acquisition, El Paso had total assets of $909.5 million (GX–7)[3] and estimated natural gas reserves of over 32.5 trillion cubic feet (GX–295, p. 17). Its operating revenues in that year were $221.5 million (GX–7), and its natural gas sales for 1956 totalled approximately 794 billion cubic feet.

Pacific Northwest was incorporated in 1949 and a year later applied to the Federal Power Commission for authorization to construct and operate a pipeline from the San Juan Basin, New Mexico, to the State of Washington (GX–2, Hearing Ex. 220), designed to supply gas to the then unserved States of the Pacific Northwest. After receiving approval of the Federal Power Commission in June 1954, the company sought

[2] "Tr.—" refers to the trial transcript, which is numbered consecutively for the dates September 4–September 11, 1962. "DX—" refers to defendant's exhibits. "GX—" refers to the plaintiff's exhibits in the court below. Many of these GX exhibits are themselves composed of consecutively numbered exhibits and are identified "GX—, Ex.—." Certain other GX exhibits are transcripts of proceedings before regulatory bodies and are identified "GX—, Merger Hearing Tr.—."

[3] As of December 31, 1961, after giving effect to the merger, El Paso's net plant investment in its natural gas business was $1,334,200,000 (GX–7).

and successfully obtained financing for its project, and in June 1955, it began construction of its line (GX–299, Ex. 2, pp. 1149–1150).

In August 1956—barely four months before the stock acquisition became effective (January 1, 1957), and while its pipeline was still under construction—Pacific Northwest began making small deliveries of gas, but it operated on only a limited scale for more than a year and did not commence to receive gas from its Canadian sources until October 1957 (GX–309, 1957, p. 16). In that year the company had a net loss of $2,067,005; in the following year, the first full year in which Pacific Northwest made deliveries through its completed system, it posted a net income of $271,651 (GX–309, 1958, p. 19); and in 1959, the figure was increased to $3,619,971 (GX–309, 1959, p. 3).

At the time of the acquisition, Pacific Northwest had constructed and placed in operation approximately 2,300 miles of main and lateral pipeline, extending from the San Juan Basin through Colorado, Utah, Wyoming, Idaho, Oregon, and Washington to a terminus at the Canadian border (Complaint, par. 8; Pacific Northwest Answer, par. 8). It produced and purchased natural gas in the San Juan Basin, sold this gas wholesale to distribution companies in Washington, Oregon, and Idaho, made direct sales to industrial customers in cities and towns along the route of its pipeline, and also sold gas to other pipeline companies for resale in Wyoming, Colorado, and Utah. At the end of 1956, Pacific Northwest had assets of $248,391,826 (Complaint, par. 8; Pacific Northwest Answer, par 8), and in 1957 had domestic and Canadian

gas reserves of 6.14 trillion cubic feet and 2.3 trillion cubic feet, respectively, under contract (GX–309, 1957, p. 19).

2. *The attempts by Pacific Northwest to enter the California market.* Until Pacific Northwest was certificated, El Paso was the only interstate natural gas pipeline serving that part of the United States which lies west of the Rocky Mountains. El Paso opposed the certification of the Pacific Northwest system (GX–75, Merger Hearing Tr. 1658). Shortly after the project received FPC approval, however, on December 11, 1954, El Paso entered into tripartite agreements with Pacific Northwest and Westcoast Transmission Company, Ltd., a Canadian pipeline with large reserves in the Peace River area of Canada and ambitions to serve El Paso's California markets (GX–73, Merger Hearing Tr. 1281). Those agreements provided for the sale by Westcoast to Pacific Northwest of 300 million cubic feet of natural gas per day at the Canadian border and the resale of 250 million cubic feet per day by Pacific Northwest to El Paso at Mountain Home, Idaho (GX–2, Ex. 24; Tr. 236–237).[4] The purpose of the agreements as described

[4] El Paso's obligation was conditional upon its obtaining FPC approval of a plan to construct a pipeline from the Pacific Northwest line at Mountain Home to the California border and to sell the Canadian gas to the California market. Such authorization, however, could not be obtained, for Pacific Gas and Electric Co., the prospective customer, insisted that gas be delivered to it at Topock, Arizona, rather than Mountain Home. See *infra*, p. 27. Consequently, on August 23, 1955, the December 11, 1954, agreement was superseded by one in which El Paso agreed to take 50 million cubic feet of gas from Pacific Northwest, to be delivered on an exchange basis at Ignacio, Colorado (GX–71, Merger Hearing Tr. 56, 57).

by Ray C. Fish, chief executive officer of Pacific Northwest, was to protect Pacific Northwest's market from future competition with a Canadian pipeline, to protect El Paso's market against future competition, and to enable all parties to work together for a common end rather than fighting each other (GX–299, Ex. 24). Mr. Fish characterized the agreements as a "treaty" which would "solve the major problems which have been confronting us" (*ibid.*). At the same time, El Paso arranged to make loans of gas to Pacific Northwest from its wells in the San Juan Basin for a five-year period; and the two companies agreed to use their respective gathering systems cooperatively, so as to avoid duplication of facilities, with Pacific Northwest gathering the gas from El Paso's wells in the eastern portion of the Basin and El Paso performing the same service for Pacific Northwest in the western portion (Tr. 475–476, 478).

Pacific Northwest, almost from its inception, sought to enter the rapidly expanding Southern California market, of which El Paso was the only out-of-state supplier.[5] In June of 1955, when the construction of the Pacific Northwest line was just beginning (GX–299, Ex. 2, pp. 1149–1150), Ray C. Fish expressed his interest in seeing "the California door open for us [Pacific Northwest] in the future" (GX–299, Ex. 25). In 1956 the company engaged in extended negotiations in an effort to consummate a sale of natural gas to the Southern California Edison Company ("Edison").

[5] In 1956, El Paso supplied more than 50 percent of all gas consumed in the State, the remainder coming from intrastate sources (GX–22).

Edison, the largest industrial user of natural gas in Southern California, was a customer of the so-called "Southern Companies" (Southern California Gas Co. and Southern Counties Gas Co., subsidiaries of the Pacific Lighting Company, and the major distribution companies serving the Southern California area), whose supplies of gas were in turn acquired from El Paso. Edison, however, was a low priority customer, and was permitted by the Southern California Companies to purchase gas only on an interruptible basis, *i.e.*, gas supplies were unavailable to Edison during periods of peak demand. (Quinton, Tr. 291). Because of the preference of smog control authorities for gas as a fuel, it was unlawful for Edison to burn oil when gas was available, and the unpredictability of when gas would be available made it impossible to forecast oil requirements. The result was that Edison was continually either over-supplied or under-supplied with oil (Tr. 290). The only solution to this dilemma was to obtain a firm supply of gas.

In January 1956, Edison attempted to interest El Paso in supplying gas directly to Edison on a firm basis, but was advised that it was El Paso's policy not to sell gas to anyone except a gas distributor and that El Paso would not wish to interfere with its customer's business relations by undertaking to sell directly to any retail customer. (Quinton, Tr. 291–293, 296; GX–83; GX–116).

Edison continued to seek a firm supply of gas and, on May 7, 1956, at a meeting arranged by an official of Phillips Petroleum Corporation, discussed the mat-

ter with representatives of Pacific Northwest. (Quinton, Tr. 295). As a result of that meeting it was mutually agreed that each party would explore the possibility of Pacific Northwest supplying 300 million cubic feet of gas per day to Edison. (GX–299, Ex. 2, p. 1120). This was the first concrete proposal Edison had obtained to meet its supply problems (Tr. 292–295), and was considered by Edison to be competitive with offers made by El Paso through the Southern Companies (GX–138).

One month later Edison received an offer from the Southern Companies to deliver to Edison 300 million cubic feet of gas per day, which El Paso was to obtain for them from a Louisiana Gulf Coast source. This was the first offer Edison had ever had from them to supply a large quantity of gas over a long period of time. (Quinton, Tr. 298; GX–82; GX–83; GX–120). On July 5, Edison rejected the offer unless certain modifications were made. (GX–179). On July 16, 1956, however, the Southern Companies advised Edison that the Gulf Coast gas was no longer available to El Paso. (GX–126).

On July 30, 1956, Pacific Northwest and Edison entered into a tentative agreement providing for a sale of 300 million cubic feet of gas at the Oregon-California border. (GX–299, Ex. 2, p. 1122). On August 6, 1956, Edison invited the Southern Companies to participate in the arrangement by taking a portion of the gas which Pacific Northwest was offering Edison (Tr. 311); on August 9, 1956, Edison made a similar attempt to interest Pacific Gas and

Electric Company (the major distributor of natural gas and electric power in the Northern California area) (Tr. 311). At about the same time, Paul Kayser, El Paso's president, learned of the agreement (GX–75, Merger Hearing Tr. 1606). Late in August, the Southern Companies and Pacific Gas and Electric declined to purchase any portion of Pacific's Canadian gas (Tr. 312) and thereby virtually doomed the project, since Edison's requirements alone were not sufficient to warrant construction of a pipeline. It was also in August that El Paso began negotiating in earnest to acquire Pacific Northwest. (GX–72, Merger Hearing Tr. 1449).

At this point El Paso abandoned its policy not to offer gas directly to Edison. Paul Kayser of El Paso, on August 21, 1956, made an oral offer of a firm supply of gas to Edison at a price of 40 cents per thousand cubic feet. During the meeting at which that offer was made, Mr. Kayser informed Edison's president that he was aware of the negotiations with Pacific Northwest, that he was determined to hold the market in Southern California, and would fight to the last ditch the efforts of Pacific Northwest or anybody else to serve it. (Kayser, Tr. 274; GX–83; GX–142, p. 2). On August 24, a formal, written offer was made by El Paso to supply gas to Edison, this time at a price of 38 cents per thousand cubic feet. (Kayser, Tr. 274; GX–83). On September 13 Ray Fish of Pacific Northwest commented: "There is considerable undercover stuff going on in connection with supplying the California market and I do believe we should endeavor to sign everything up just as quickly as possible." (GX–299, Ex. 38).

On October 2, 1956, Paul Kayser met with Edison and reduced the price at which he would supply Edison to 34 cents per thousand cubic feet. When Edison declined to accept the offer, Mr. Kayser returned the same afternoon and offered the gas to Edison at a price of 30 cents. (Quinton, Tr. 309–311; GX–149). In a letter of the same date, Edison terminated its preliminary agreement with Pacific Northwest. (Quinton, Tr. 308; GX–144). On October 5, 1956, Edison entered into a contract with El Paso to purchase 100 million cubic feet of gas. (GX–149; GX–309, 1956, p. 5). On November 27, 1959, the Federal Power Commission refused to approve the sale on the ground that Edison's intended use of the gas as fuel for its steam-electric boilers was an inferior use of natural gas. (Tr. 247; 22 F.P.C. 900). Cf. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1.

3. *The merger.* During this period, negotiations looking toward the acquisition of Pacific Northwest were in progress. As early as 1954—the same year in which Pacific Northwest was certificated—El Paso made its first merger overtures to the new company (Tr. 241; GX–299, Ex. 2, p. 1179). In December 1955 El Paso offered to exchange five shares of its stock for nine shares of the stock of Pacific Northwest (GX–2, Hearing Ex. No. 386, p. 959). Serious negotiations were commenced in August 1956 and culminated in October 1956 in an offer by El Paso to exchange seven shares of its stock for each eight shares of Pacific Northwest stock. This offer was accepted by Pacific's directors in an agreement dated November 8, 1956 (GX–299, Ex. 2, p. 1128). The

stock which made up the final purchase price had a market value of $140 million, a premium of $112 million over the book value of Pacific Northwest's assets (GX–2, Merger Hearing, Ex. 3, Proxy Statement, p. 5). El Paso's offer became effective January 1, 1957 (GX–299, Ex. 2, p. 1186). By May 31, 1957, El Paso had acquired 99.8 percent of the outstanding stock of Pacific (GX–295, pp. 49–50). On July 22, 1957, the Department of Justice filed the instant antitrust action.

On August 7, 1957, El Paso filed an application with the Federal Power Commission to acquire the assets of Pacific Northwest. On December 23, 1959, the Commission issued an order granting certificates for the merger of Pacific Northwest into El Paso, and the merger of the two companies was effected on December 31, 1959 (GX–309, El Paso Annual Report 1959, p. 4). On April 30, 1962, this Court, in *California* v. *Federal Power Commission*, 369 U.S. 482, held that the Commission's order authorizing the asset merger was invalid because the Commission should not have acted until the district court had determined whether the merger violated the Clayton Act.

B. THE DECISION OF THE DISTRICT COURT

The trial of this case was held in the District Court for the District of Utah before Chief Judge Ritter from September 4 to September 11, 1962. After submission of briefs by the parties and proposed findings by the government,* and after oral argument, Judge

*The court requested both parties to submit proposed findings in advance of the oral argument; the defendants did not do so.

Ritter ruled from the bench that judgment would be for the defendants, directed defendants to prepare findings of fact and conclusions of law and stated that he would not write an opinion. Thereafter, the 130 findings of fact and the conclusion of law proposed by the defendants were adopted by the court verbatim.

The court found that there was no evidence that El Paso had any anticompetitive purpose in acquiring Pacific Northwest (Fdg. 40), and that the acquisition had the benefit of enabling El Paso to improve its ratio of residue gas (gas produced in conjunction with oil) over dry gas (gas produced from gas wells independent of oil production) (Fdgs. 9, 10, 26, 40, 115, 129), as well as the further benefit of allowing El Paso to extend natural gas facilities in the Northwest and to maintain lower rates than Pacific Northwest could have offered (Fdg. 127).

The exploration for and the production, transportation, and sale of natural gas was adopted by the court as the "line of commerce" for testing the legal effect of the merger under the Clayton Act (Fdg. 47). The United States proposed several alternative geographical areas as "section[s] of the country" within which to appraise the competitive effect of the merger on the distribution of natural gas.[7] In this Court, however, the government's attack on this aspect of the merger (distribution) rests primarily upon its anti-

[7] The government proposed the following six areas: (1) the Eleven State Market of California, Oregon, Washington, Idaho, Nevada, Arizona, New Mexico, Utah, Wyoming, Colorado and Texas; (2) the Ten State Market consisting of the Eleven State Market less Texas; (3) the Eight State Market consisting

competitive effect in the California and Southern California markets. With respect to those markets, the court found that although Pacific Northwest had attempted to sell Canadian natural gas to Southern California Edison shortly before the merger in 1956 (Fdgs. 90, 91), it had never actually made a sale (Fdg. 66), and, in view of its financial condition, probably could not have succeeded in selling gas in the California market at that time (Fdg. 94). The court further found that if Pacific Northwest had remained an independent entity, it could not in the future (a) have obtained a contract from the Southern Companies or from Pacific Gas and Electric; (b) have acquired or arranged for the necessary gas supplies, obtained the requisite financing or built the necessary pipeline facilities to support a feasible interstate project to California; (c) have put together an interstate project to serve California acceptable to the Federal Power Commission; or, in consequence, (d) have provided any substantial competition for the sale or trans-

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of the Ten State Market less Wyoming and Colorado; (4) the Pacific Coast Market of California, Oregon and Washington; (5) the California Market; (6) the Southern California Market. The court found that the government's four broadest market areas did not constitute appropriate or relevant "section[s] of the country" (Finding 104–105); and that there had been no competition or reasonable probability of future competition between the two pipelines in the States comprising those areas, and hence no lessening of competition as a result of the merger (Fdgs. 54, 59, 60, 61, 62, 64, 65). It also found that while Pacific Northwest and an El Paso subsidiary, Utah Natural Gas Company, were both serving the same Utah customer (Mountain Fuel Supply Company, the distributor for the Salt Lake City area) it was unlikely, had there been no merger, that either El Paso or its Utah subsidiary would have sought to compete with Pacific Northwest for further sales in that State (Fdgs. 56, 57, 58).

portation of natural gas in California or Southern California (Fdgs. 97–101).

The court also made findings as to developments in the California market since the commencement of the antitrust action. It found that the Transwestern Pipeline Company, pursuant to a 1958 gas purchase contract, is now delivering to the Southern Companies 300 million cubic feet of gas per day through a newly constructed pipeline from Texas; that in 1960 Pacific Gas Transmission Company, an affiliate of Pacific Gas and Electric, constructed a pipeline to transmit Canadian natural gas supplies controlled by Pacific Gas and Electric from the Canadian border to California; that both the above lines have excess capacity; that the Southern Companies have been exploring for natural gas reserves, and have obtained leases on 59,000 acres of promising gas lands, in the Rocky Mountain area; that an affiliate of Tennessee Gas Transmission Company has entered into an agreement to transport Texas gas to Edison through a proposed pipeline project now pending before the Federal Commission[8]; that the so-called "Rock Springs"

[8] This project, known as the "Pemex" project, contemplated the transportation of 300 million cubic feet of Texas-produced gas and 75 million cubic feet of Mexico-produced gas through the Republic of Mexico for consumption in Edison's steam-electric power plant. Effective January 3, 1963, this project was withdrawn. On February 12, 1963, Gulf Pacific Pipeline Company, another subsidiary of Tennessee Gas Transmission Company, filed an entirely new application for certificate authorization to construct pipeline facilities to transport gas through the United States from Texas to Los Angeles. It is anticipated that the gas will be purchased directly from the producers in Texas by Edison and the Department of Water and Power of the City of Los Angeles.

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project (involving the collaboration of El Paso and Colorado Interstate Gas Company), also pending before the Power Commission, contemplates the delivery of 400 million cubic feet per day to the Southern Companies; and that in light of these developments, there is no reasonable probability that El Paso will be able to make further sales in California or that Pacific Northwest, had it remained independent, would have been able to do so (Fdgs. 79–84, 87).

The government proposed the San Juan Basin and the Rocky Mountains gas-producing areas as "sections of the country" within which to measure the competitive impact of the merger on the acquisition of natural gas reserves. Without passing upon whether those areas constituted relevant geographical sections, the court found that both El Paso (beginning in 1948) and Pacific Northwest (during the period 1952–1954) had acquired or sought to acquire reserves in the Rocky Mountains area, including the San Juan Basin; that those efforts, however, did not result in substantial competition even though, in various instances both companies made offers to the same producers; that after 1954 there was little or no competition between El Paso and Pacific Northwest in the acquisition of gas supplies; that, at the date of the merger, virtually all the then known reserves in the San Juan Basin had already been acquired under long-term contracts and dedicated to the interstate market; and that there was no reasonable prospect that in the future the two pipelines would have competed with one another for reserves in the San Juan Basin or elsewhere in the Rocky Mountains (Fdgs. 115, 116, 118, 119, 120, 123).

THE QUESTION IS SUBSTANTIAL

This appeal in a major antitrust case presents a substantial question as to the standards for determining whether a substantial lessening of competition, in violation of Section 7 of the Clayton Act, results from the merger of two major natural gas companies.

The case is a sequel to *California* v. *Federal Power Commission*, 369 U.S. 482, in which this Court held that the Power Commission should not have passed upon the proposed acquisition by El Paso of Pacific Northwest's assets while the validity under the antitrust laws of El Paso's prior acquisition of Pacific Northwest's stock was under attack in the district court. Here the United States seeks review of the district court's holding that the merger did not contravene Section 7, which prohibits acquisitions

> where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

1. In the present case, the relevant line of commerce is the production, transportation, and sale of natural gas and the crucial "section of the country" is California, particularly Southern California. The evidence in the record establishes that at the time of the stock acquisition the acquired company, Pacific Northwest, was the only major pipeline company (other than El Paso) west of the Rocky Mountains; that a few months prior to the acquisition it had made a determined, though unsuccessful, effort to consummate the sale of a substantial quantity of natural gas in the dynamic Southern California market, thereto-

fore served only by El Paso; that if Pacific Northwest had remained an independent entity such efforts would undoubtedly have continued; and that there was a *reasonable basis* for concluding that its resources would have enabled it, either immediately or in the future, to carry out the projects it proposed to undertake. It is the government's view that these elements compel the legal conclusion that the merger had the anti-competitive effect forbidden by Section 7 and therefore violated the statute.

The findings of the district court, as we read them, do not contradict those factual propositions. The court's conclusion that the merger did not substantially lessen competition was predicated, rather, upon a series of findings that related not to the likelihood that an independent Pacific Northwest would have continued to attempt to sell in and gain access to the California market, but to whether such attempts would have succeeded. Thus, the court found that Pacific's financial condition and the insufficiency of Canadian reserves available for delivery to California would have made it impossible for Pacific Northwest to sell gas in California at the time of the merger (Fdgs. 94, 96). And it further found that Pacific Northwest, had it remained an independent entity, could not in the future have obtained the gas supplies or financing necessary to support a feasible pipeline project to California (Fdg. 98); to obtain a contract from the California purchasers (Fdg. 97); or to gain the approval of the Federal Power Commission (Fdg. 99).

In making the legality of the merger turn upon the likelihood of Pacific Northwest's succeeding in its attempts to sell in the California market, rather than upon the likelihood that, had it not been for the merger, Pacific Northwest would have continued to be an active and important competitive factor in that market, the district court seriously misconceived the statutory concept of competition, as it applies to the natural gas industry. Thus the thrust of our argument is not merely that the findings were not supported by the evidence—though we think that the court's highly conjectural inferences as to the future were, on their face, unreasonable—but rather that the court adopted an inappropriate legal standard.

a. The typical contract for the sale of gas by a pipeline to a local distribution company requires the seller to meet the buyer's specified demand (sometimes hundreds of millions of cubic feet per day) for a protracted period (usually 20 years). The executed contract is submitted to the Federal Power Commission, which, pursuant to its authority under the Natural Gas Act, controls entry into the market by granting or withholding authorization to construct facilities or to sell or transport gas in interstate commerce (15 U.S.C. 717f(c)). Once a sale is completed by the parties and certificated by the Commission, the substantial segment of demand represented by that contract is withdrawn from the market and insulated from further competition. It is apparent, therefore, that competition among pipelines does not relate to demand which is already "spoken for," *i.e.*, served

by existing facilities under existing long-term contracts. Rather, it takes the form of rival efforts to promote new construction projects and natural gas sales with a view to satisfying new demand as it develops—proposals which, if accepted by the purchaser, may then be submitted to the Federal Power Commission. This feature of the industry has two important consequences:

First, since unserved increments of demand sufficient to warrant the construction of a new pipeline are not continuous, but accumulate from time to time, there is no sharp line between actual competition and potential competition among pipelines in a particular market. In effect, competition consists in the readiness to make proposals as much as in their making.

Second, in considering whether a pipeline is a "competitor" in a particular market area, the fact that it has existing facilities there (assuming them to be fully utilized) is of little relevance; even pipelines which already serve a given market are "competitors" only to the extent that they stand ready to undertake further construction to meet new demand in the future.

b. In light of these considerations, it is plain that Pacific Northwest was a competitor in the California market at the time it was acquired by El Paso. At the time of the stock acquisition (January 1957), Pacific Northwest was a quarter-billion dollar corporation, and the only pipeline other than El Paso operating west of the Rocky Mountains. Faced with the problem of excess capacity and threatened with a

possible deficit of demand in its originally certificated market area (Washington, Oregon and Idaho), Pacific Northwest had already embarked upon a search for new markets and had come into direct confrontation with El Paso in Utah, where both companies were substantial suppliers of the same customer (the distribution company serving Salt Lake City). Almost from its inception, moreover, Pacific Northwest had been eager to gain a foothold in California, the nation's largest and most rapidly expanding market for natural gas, which was then dependent exclusively upon El Paso for its out-of-state supplies. In August 1956, Pacific Northwest made a determined effort to gain that foothold, offering to meet Southern California Edison's declared need for firm gas by selling it 300 million cubic feet per day from Pacific's large Canadian reserves. And while these negotiations eventually failed because of the unwillingness of Pacific Gas and Electric and the Southern Companies to participate, see *supra*, pp. 9–11, they produced the kind of competitive effect which it is the basic object of the antitrust laws to foster, *i.e.*, they stimulated El Paso to abandon its long-standing policy against making direct sales to retail customers and to make Edison a series of offers at progressively lower prices.

Had the merger not intervened, the competitive pressure would doubtless have continued. The evidence demonstrates Pacific's continuing interest in California right up to the very eve of the stock acqui-

sition. In a memorandum dated October 18, 1956, which summarized a meeting at which terms of acquisition were negotiated, it was recited that Pacific Northwest had substantially concluded contracts for the purchase of Canadian gas and that "Pacific plans on selling this additional volume of gas to the California market" (GX-299, Ex. 41, pp. 3-4). Again on November 5, 1956, just three days prior to the day on which its directors agreed to a stock exchange with El Paso, Pacific Northwest made a firm offer to Pacific Gas and Electric to supply the future requirements of the California market (GX-299, Ex. 42; Ex. 2, p. 1172). And even after the stock exchange had been approved, Pacific Northwest continued to deal separately with the California markets in order to assure that, if its arrangements with El Paso collapsed, it would still have the potential of serving those markets (GX-299, Ex. 43). It is the government's basic position that, by closing the door to any future renewal by an independent Pacific Northwest of the kind of attempt which it had already made to secure a customer otherwise dependent at that time solely upon El Paso for its out-of-state gas, the stock acquisition here had the effect of lessening competition and thereby contravened Section 7 of the Clayton Act.

c. The district court, without disputing the eagerness of Pacific Northwest to serve the California market, or the likelihood that it would have continued to try, nonetheless upheld the merger, apparently on the ground that Pacific Northwest could never have succeeded in (i) making a sale, (ii) obtaining FPC ap-

proval, or (iii) developing a feasible pipeline project.

As for the first of these—making a sale—speculation is clearly inappropriate. When a supplier has made a vigorous effort to secure an order from a buyer previously dependent solely upon another seller, he does not cease to be a "competitor" merely because his endeavors prove unsuccessful. So long as the buyer has had an opportunity to choose between alternative sources of supply, he has enjoyed the benefit of a competitive market—a benefit which it was the purpose of the antitrust laws to preserve.

It is equally clear that a conclusion as to the effect of the merger upon competition—not sales but competition—cannot be predicated upon conjectures as to what the Federal Power Commission might have done if Pacific Northwest had ever applied for its approval to build a line or sell gas to California. For, as we have shown, competition in the natural gas industry consists of attempts to put together projects, and the effect upon competition of the elimination of a firm engaged in such endeavors does not depend on whether the Commission ultimately might approve or disapprove a particular project which it has formulated. In any event, a court cannot possibly foretell, with the precision necessary for a determination as to the effect of a merger on competition, how the Commission will rule on a particular future project that may be presented to it.

Nor should the court have attempted (1) an assessment of the economic soundness of Pacific Northwest's proposals of 1956, or (2) a hypothetical forecast as

to the company's ability to launch a feasible pipeline project in the future. The feasibility of a project—including the adequacy of its gas reserves and potential financing—is a question which the Federal Power Commission is regularly called upon to decide in its certificate proceedings, and even with the assistance of a staff of trained and expert personnel, the Commission often requires many months before arriving at a decision. Yet here the district court has undertaken a vastly more difficult and speculative inquiry: whether Pacific Northwest would ever have been in a position to put together a viable enterprise.

We submit that the Clayton Act, in proscribing mergers tending to lessen "competition," sanctions no such inquiry. If Pacific Northwest had actually consummated its sale to Edison in 1956 and then had been acquired by El Paso while its application for certificate authority was still pending before the Federal Power Commission, no one would seriously argue that the antitrust consequences of the acquisition should turn upon the court's prophecy as to the outcome of the administrative proceeding or upon the court's own appraisal of the feasibility of the project. The relevance of such an appraisal should be no greater here. The undisputed evidence showed that Pacific Northwest proposed and negotiated for a contract for the sale of substantial gas which a potential customer took seriously as a practical business enterprise. The parties evidently thought that there was a realistic basis for believing that Pacific Northwest possessed adequate resources to carry out

its proposed undertaking and that its proposals merited the serious consideration which they received. And El Paso was sufficiently concerned by the competitor's proposal to respond with a change in its own business practices.

Quite apart from this specific proof of its ability to bring competition to the market, Pacific Northwest was a substantial factor in the area. It had already persuaded the Federal Power Commission of the feasibility of its original pipeline project and had succeeded in raising $250 million to pay for the construction of that project. Its founder, Ray C. Fish, had had extensive experience in engineering, building, and initially operating major pipeline systems and had never failed to obtain the necessary backing for any venture he had undertaken. Mr. Fish testified, moreover, that, both in retrospect and at the time of his negotiations with Edison, he was completely confident of his ability to finance the California line and that the company's main investment banking house, with whom he had discussed the matter, at no time discouraged him in his thinking.[9] (GX–299,

[9] El Paso's contrary contention rested largely upon the testimony of Stuart Silloway, President of Pacific Northwest, at the FPC merger hearings. Silloway declared that it would have been difficult for an independent Pacific Northwest to obtain fina[illegible] (DX–G Merger Hearing, Tr. 128) and that had it remained static in serving only the markets in the states of Washington, Oregon and Idaho, its financial and gas reserve situation would have further deteriorated (DX–G, Merger Hearing, Tr. 134–136). However, Silloway testified that the gas supply for its certificated markets as of the time of the merger had ceased to be a "cause of any concern" (DX–G, Merger Hearing Tr. 122).

Ex. 1, pp. 661–663, *id.*, Ex. 2, pp. 1108–1109, 1191–1192).

Beyond that, moreover, Pacific possessed certain unique geographical assets, which gave it important advantages over any other pipeline which might have sought to enter the California market. First among these, of course, was its proximity to both the Northern and Southern California markets; the distance, for example, from Rock Springs, Wyoming (a connecting point on the Pacific Northwest line) to possible delivery points on the California border is only 550 miles, as opposed to the 1,200 miles which must be spanned by a pipeline originating in the gas fields of Texas (Tr. 218–220). Even more important, Pacific Northwest, anchored to the San Juan Basin in the South, was at the same time the only pipeline connected and readily accessible to the newly explored and fast developing gas-producing regions of the Rocky Mountains and Western Canada. Both of these areas hold the promise of enormous untapped reserves of natural gas, and both are looked upon by the Southern Companies, as well as by El Paso, as important sources of future supply (Tr. 486, Tr. 408, GX–2, Hearing Ex. 411).

Indeed, it was precisely these advantages—proximity to the California market and access to Canadian and Rocky Mountain reserves—which El Paso prized in Pacific Northwest, which induced it to acquire Pacific Northwest's stock at a substantial premium, and which it subsequently made continuing efforts to exploit. Thus, the trial court found that El

Paso's purpose since the end of 1954 in seeking to acquire Pacific Northwest was to obtain additional gas supplies and reserves to enable it to serve its certificated market (California), and to that end, to "acquire Pacific Northwest's gas reserves and gain access to gas producing areas in the Rocky Mountains and Canada" (Fdg. 40). Moreover, the record shows that since 1955, El Paso has on three separate occasions advanced proposals looking to the transmission of Canadian gas to the California market through facilities to be constructed as offshoots of the existing Pacific Northwest line. In 1955, while Pacific Northwest was still an independent company, El Paso offered to deliver to Pacific Gas and Electric and the Southern Companies, at a point on the California border near Reno, Nevada, the 250 million cubic feet of Canadian gas which El Paso had conditionally agreed (see *supra*, p. 6) to receive from Pacific Northwest at Mountain Home, Idaho.[10] In 1957, Pacific Northwest, by then a wholly-owned subsidiary of El Paso, purchased an additional 400 million cubic feet of Canadian gas and agreed to deliver it to El Paso at Twin Falls, Idaho; El Paso, in turn, contracted to deliver the gas to the Southern Companies at a border point near Las Vegas, Nevada, through a line running off the Pacific Northwest facilities at Twin Falls (Tr. 485). There followed a prolonged delay in obtaining the nec-

[10] The Mountain Home project collapsed when the two California purchasers insisted upon taking the specified quantity of gas at their traditional delivery point, Topock, Arizona, rather than at Mountain Home (Tr. 481–484).

essary export permit from the Canadian authorities, and although a permit was eventually issued in 1958 to export 150 million cubic feet, the parties had by that time abandoned the Twin Falls venture in favor of a new project—the so-called "Rock Springs" project—involving the collaboration of El Paso, Pacific Northwest (El Paso's subsidiary until the Power Commission approved the asset merger, at which time it became the Pacific Northwest Division), and Colorado Interstate Gas Company (Tr. 484–493). This proposal—now pending before the Federal Power Commission (Fdgs. 83, 84)—contemplates the construction (in part by El Paso and in part by Colorado Interstate), of a 550 mile pipeline from a connection on Pacific Northwest's line at Rock Springs, Wyoming, to the California border (Tr. 219), and the transmission to the Southern Companies of more than 400 million cubic feet of gas, to be supplied in equal parts by Colorado Interstate and Pacific Northwest.[11] The Rock Springs project does not draw upon any of El Paso's own premerger pipeline facilities or gas reserves; it depends substantially, however, upon the facilities and

[11] Tr. 489–499. One-half of Pacific Northwest's quota of 200 million cubic feet per day was made available by the release by Colorado Interstate of gas committed to it by Pacific Northwest under a long-term purchase contract executed prior to the stock acquisition (Fdg. 83; Tr. 492). This contribution to the Rock Springs project—100 million cubic feet per day—came, therefore, from reserves controlled by Pacific Northwest when it was still an independent company. El Paso's president intimated in his testimony, moreover, that the remaining portion of Pacific Northwest's quota might come from the 150 million cubic feet per day supply which Pacific Northwest had arranged to import in connection with the Twin Falls project, *supra* (Tr. 499).

reserves of Pacific Northwest, and, if certificated,[12] would bring to the California market large supplies of natural gas (including, probably, Canadian supplies) which Pacific Northwest controlled; or could readily have obtained, as of the time of the merger. It is significant, moreover, that in a brief submitted to the Federal Power Commission in connection with its certificate application for the Rock Springs project, El Paso stated that it would interpose no objection to the inclusion of the project as part of a reconstituted Pacific Northwest, should a divestiture of its Pacific Northwest stock be decreed. (Reply Brief of El Paso Natural Gas Company, F.P.C. Docket Nos. G–16235, *et al.*, pp. 25–26).

Even in the short-run, therefore, Pacific Northwest's formidable geographical position opened to it a wide range of opportunities which El Paso, after the merger, was quick to exploit. Had Pacific Northwest remained an independent company, there is every likelihood that it, rather than El Paso, would have attempted to pursue these possibilities; and that it, rather than El Paso, would have undertaken the Twin Falls and Rock Springs projects or others like them. In that event, its endeavors to gain a foothold in the California market would clearly have constituted "competition" within the meaning of the Clayton Act, even if ultimately they might not have succeeded. In adopting a legal standard which required the gov-

[12] On December 18, 1962, an FPC hearing examiner decided, on various grounds, that the Rock Springs project would not serve the public convenience or necessity and that a certificate should therefore be denied. F.P.C. Docket Nos. G–16235, *et al.*

ernment to prove that these or similar projects would be successful, or to negate evidence that they would not, the court seriously misapplied the statutory concept of "competition."

The unacceptability of the court's legal standard emerges even more clearly when the competitive potential of Pacific Northwest is considered in a longer-run perspective. Whatever doubt there may be as to whether Pacific Northwest would in fact have been able to market its gas in California in the six years which have elapsed since the merger, or even in the years which lie immediately ahead, there is no basis whatever for the court's speculative conclusion that Pacific would not in the long run be in a position to fulfill its declared objective. The California market, expanding at an annual rate of 200 million cubic feet per day (Fdg. 86), is and will continue to be the nation's most important market for natural gas; the Rocky Mountains and Western Canada remain the largest undeveloped sources of natural gas supplies; and the Pacific Northwest was, at the time of the acquisition, and, with one exception, is today the only pipeline in a position to link these vitally interdependent regions. Viewed in the light of these overriding long-term considerations, the temporary disabilities under which Pacific Northwest may have labored in the very first year of its operation were insufficient to justify the conclusion that the company's elimination as an independent enterprise did not substantially lessen competition.

In sum, the record plainly establishes that Pacific Northwest had made proposals which, though unsuccessful, had been given serious consideration; that it was a substantial and responsible company which had succeeded in obtaining certification by the Federal Power Commission and in financing a $250,000,000 pipeline; and that it possessed fundamental geographical strengths which gave it a unique opportunity to compete in the California market—strengths which El Paso was eager to obtain and astute to exploit. In these circumstances, we submit that the kind of inquiry here made by the district court into the financial condition of Pacific Northwest and its attempt to predict with certainty whether Pacific Northwest could ever succeed in its endeavors to build a pipeline—while perhaps appropriate in a case where it is claimed that the acquired firm is a failing company (*International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291)—had no place in determining whether the acquisition by El Paso of this young and vigorously-competing company substantially lessened competition.

2. The district court's unduly restrictive conception of "competition" was also reflected in its holding that the merger did not substantially lessen competition in the purchase of natural gas reserves in the San Juan Basin and Rocky Mountain areas (Fdgs. 115–124). The undisputed evidence showed, and the court found, that both El Paso and Pacific Northwest had been active in acquiring and seeking to acquire gas reserves in the San Juan Basin, and in some instances had actually bid for the same acreage (Fdgs. 115, 116,

118; Tr. 388, 390–392). In concluding, nonetheless, that there had been no foreclosure of competition, the court appears to have relied upon its further findings that the great bulk of the gas supplies acquired by Pacific Northwest in the Basin had been obtained by the producers to whom El Paso had not made offers; that El Paso's reserves were located chiefly in the western sector of the Basin and Pacific Northwest's in the eastern part; and that at the date of the stock acquisition virtually all of the then known reserves in the Basin had already been purchased or leased (Fdgs. 118–120).

These findings do not support the court's legal conclusion. Although the occasions on which both companies made offers to the identical producer for the identical reserves may not have been frequent, it is clear that their mutual presence provided producers throughout the area with a choice of customers. And while it may be true that substantially all of the reserves known to exist at the time of the merger had already been contracted for, there can be no doubt that the merger foreclosed competition for those reserves, particularly the deeper horizons of the Basin, which future exploration promised to make available (See GX–75, Merger Hearing Tr. 1636–1637). This consideration is even more pertinent, we would add, with respect to the Rocky Mountain area, a region of vast undeveloped reserves, in which, as the record shows, both El Paso and Pacific Northwest were actively seeking supplies (GX–73, Merger Hearing Tr. 1329; GX–299, Ex. 2, p. 1147; Tr. 225–226, 383–387).

CONCLUSION

The question presented by this appeal is substantial and of public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LEE LOEVINGER,
Assistant Attorney General.
FRANK GOODMAN,
Assistant to the Solicitor General.
ROBERT B. HUMMEL,
MICHAEL I. MILLER,
Attorneys.

MARCH 1963.

APPENDIX

In the United States District Court for the District of Utah, Central Division

C 143–57

UNITED STATES OF AMERICA, PLAINTIFF

v.

EL PASO NATURAL GAS COMPANY AND PACIFIC NORTHWEST PIPELINE CORPORATION, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on for trial on the 4th day of September, 1962, before the Honorable Willis W. Ritter, Chief Judge of the United States District Court for the District of Utah, Central Division, sitting without a jury. The trial thereof was had on September 4, 5, 6, 7 and 10; evidence, both oral and documentary, was heard and received by the Court; briefs and reply briefs were submitted and oral argument heard on September 11 and October 19, and thereafter the matter was submitted for decision; and the Court, having considered all the evidence, briefs and arguments, does hereby make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

Parties, acquisition and merger, jurisdiction

1. The defendant El Paso Natural Gas Company (herein called "El Paso") was at all relevant times, and now is, a corporation organized and existing under the laws of the State of Delaware, with a principal office in El Paso, Texas.

2. El Paso was at all relevant times, and now is, a "natural-gas company" within the meaning of Section 2 of the Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. §§ 717–717w, and engaged in interstate commerce.

3. At the commencement of this action and until its merger into El Paso, the defendant Pacific Northwest Pipeline Corporation (herein called "Pacific Northwest") was a corporation organized and existing under the laws of the State of Delaware, with a principal office in Salt Lake City, Utah.

4. At the commencement of this action and until its merger into El Paso, Pacific Northwest was a "natural-gas company" within the meaning of the Natural Gas Act and engaged in interstate commerce.

5. In January 1957, El Paso acquired more than 80% of the common stock of Pacific Northwest pursuant to its exchange offer dated January 8, 1957, and by May 1957 had acquired 99.8% of said stock. On December 31, 1959, Pacific Northwest was merged into El Paso under Delaware law pursuant to an order of the Federal Power Commission.

6. The United States instituted this action on July 22, 1957 under Section 15 of the Clayton Act, 38 Stat. 736 (1914), as amended, 15 U.S.C. § 25. The complaint, as amended, alleges that the acquisition by El Paso of the stock of Pacific Northwest and the merger of Pacific Northwest into El Paso violate Section 7 of the Clayton Act, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 18. The complaint prays for an order of divestiture and such other and additional relief as the Court may deem just and proper.

THE INDUSTRY

7. Natural gas consists primarily of hydrocarbons and is a wasting natural resource. Along with hydro-

electric and steam-generated electric energy, fuel oil and coal, it is an important source of heat and energy.

8. The natural gas industry consists of the exploration for and development of reserves of natural gas and its production, transportation, sale and distribution to the ultimate consumers in the various markets of the country.

9. Natural gas is obtained either as "dry" gas from gas wells, or as "wet" or "residue" gas from oil wells from which it is produced in connection with the production of crude oil or other liquid hydrocarbons. The quantities of "residue" gas produced from a given oil field vary with and are dependent upon the quantities of oil which the appropriate State regulatory agency will permit the producers to withdraw from the field. There are daily, monthly and seasonal variations in the quantities of "residue" gas available for sale, which are not related to the supply of, or demand for, natural gas, but which result from fluctuations in the production of oil.

10. Both "dry" and "residue" gas are found in underground strata or reservoirs in various fields or basins located for the greater part in an area extending from the Gulf Coast of Louisiana through Texas and Oklahoma to the Rocky Mountains, and thence in a northerly direction to Canada and within Canada itself. Such fields or basins are also found throughout California.

11. The principal demand for natural gas is in the larger population centers of the country, in which natural gas is distributed and sold to residential and commercial customers for such uses as space heating, water heating and cooking, and to industrial customers for use as boiler fuel for the generation of electricity, for industrial processes and for heating purposes.

12. Sales for residential and commercial uses are upon a firm demand basis, while those for industrial uses, such as boiler fuel, are frequently upon an "interruptible" basis, i.e., the deliveries are subject to curtailment or discontinuance when the gas is needed to meet the needs of domestic and commercial customers and other firm loads. Interruptible sales to industrial users improve the "load factor", i.e., the ratio of average daily output to maximum daily delivery capacity, and assist in keeping down rates to the benefit of domestic and commercial users.

13. Natural gas is in direct competition with other sources of energy, including fuel oil and electricity generated from fuel oil and falling water, in the areas in the western United States in which El Paso or Pacific Northwest have sold or sell natural gas. Fuel oil and electricity compete for the same uses and purposes as natural gas; competition of fuel oil with natural gas for boiler fuel purposes is particularly vigorous.

14. Pipelines are the only practical means of transporting natural gas, and large diameter pipelines can transport large volumes of natural gas under high pressure at a low average cost per thousand cubic feet, particularly if they are operated at a high "load factor".

15. Pipelines are built from gas producing fields which are substantial sources of gas supply to metropolitan areas which are substantial markets for natural gas. Along the routes of the pipelines, service is provided to smaller communities and natural gas is obtained from smaller fields which could not of themselves support a pipeline.

16. Companies whose activities in respect of natural gas are devoted to the exploration for, and the development and production of natural gas for sale within

fields of production, are usually referred to as "producers" or "independent producers". Companies which are engaged in transporting natural gas from the fields of production to distribution centers are usually referred to as "pipeline companies"; but pipeline companies frequently engage as well in the exploration for and the development and production of natural gas. Companies which own and operate the distribution systems and sell natural gas to the ultimate consumers in the metropolitan centers are usually referred to as "distribution companies". Distribution companies also may own main line transmission systems reaching from the fields of production to the centers of distribution, and may, and sometimes do, explore for, develop and produce natural gas in the field.

17. The construction and expansion of long distance pipelines are dependent upon a market being available on a long-term basis and upon adequate gas supply and reserves firmly committed thereto. On the market end, interstate sales of natural gas are made pursuant to long-term contracts which frequently extend for as many as 20 years.

18. Such long-term commitments and arrangements arise out of the need of the public and the distribution companies to have adequate, continuous and dependable supplies and service at reasonable rates, and of the pipeline companies to justify the equity investment and debt financing required for the construction of transmission facilities and the acquisition of gas reserves.

19. The result of these needs and commitments in the natural gas industry is that large sums must be invested not only in the acquisition, development and dedication of adequate present and future gas supplies and reserves, but also in the construction,

expansion, operation and maintenance of pipeline facilities to transport the natural gas from the producing areas to market. Thus, on December 31, 1961, the net plant investment after depreciation dedicated by El Paso to its interstate natural gas business to fulfill its contract commitments certificated by the Federal Power Commission was $1,334,200,000.

EL PASO NATURAL GAS COMPANY

20. El Paso at all relevant times was, and now is, engaged in the exploration for and production, purchase, transportation and sale of natural gas. It transports and sells its own gas and is not a common carrier.

21. At the commencement of this action, El Paso owned and operated an integrated and interconnected pipeline of over 6,700 miles, connecting oil and gas fields in the Permian Basin in southeastern New Mexico and an adjacent area of west Texas, in the Panhandle Field in Texas and Oklahoma, and in the San Juan Basin in northwest New Mexico and southwest Colorado, with the population centers where El Paso sells natural gas.

22. At the commencement of this action, El Paso was selling natural gas principally to distribution companies in California, Arizona, southern New Mexico, southwestern Nevada, west Texas and Colorado. It also sold directly to certain industrial consumers, and to cities and towns along the routes of its pipelines.

23. In the year ending December 31, 1956, El Paso had total assets of $909,531,950 and total operating revenues of $221,515,546.

24. At January 1, 1957, El Paso's pipeline system had a certificated delivery capacity of 2,488 million cubic feet per day.

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25. At the commencement of this action, El Paso owned the stock of Utah Natural Gas Company which, pursuant to contract and authorization of the Utah Public Service Commission, supplied gas to Mountain Fuel Supply Company for distribution in the Salt Lake City area.

26. Prior to and at the time of the acquisition, a major portion of El Paso's gas supply consisted of "residue" gas produced in connection with oil. Utilization of such gas involved difficult operating problems. The availability of "residue" gas is dependent upon the production of oil which fluctuates from day to day, and not upon the demand for gas. In order to market a substantial amount of "residue" gas, it is necessary to have sources of "dry" gas produced from gas wells, the flow of which is adapted to the demand for natural gas, so as to balance daily requirements of supply against wide fluctuations in "residue" gas supply. El Paso's daily supply of "residue" gas has varied as much as 500 million cubic feet. In 1948, in order to offset violent swings in the daily availability of "residue" gas, El Paso had commenced to develop "dry" gas reserves in the San Juan Basin.

27. At the time of the acquisition, and for several years prior thereto, El Paso also had a serious gas reserve problem. By 1956, the Federal Power Commission and its staff had seriously questioned the sufficiency of El Paso's natural gas reserves. In July 1956, the staff asserted that El Paso had but a two to three-year supply to meet its long-term certificated commitments. The Federal Power Commission subsequently found in December 1956 that this contention was correct.

28. The continuing need of El Paso for supplies and reserves was such that it was necessary for it to purchase approximately a trillion cubic feet of gas

annually, in order to replace gas supplies as they were exhausted in the fulfillment of its existing service agreements.

PACIFIC NORTHWEST PIPELINE CORPORATION

29. At the commencement of this action and until its merger into El Paso, Pacific Northwest was engaged in the exploration for and purchase, production, transportation and sale of natural gas. It transported and sold its own gas and was not a common carrier.

30. It owned and operated a pipeline system which in 1957 consisted of approximately 2,300 miles of main and lateral pipelines extending from the San Juan Basin near Ignacio, Colorado through the states of Colorado, Utah, Wyoming, Idaho, Oregon and Washington to a terminus on the International Boundary between Canada and the United States near Sumas, Washington. It purchased and produced natural gas in the San Juan Basin of northwestern New Mexico and southwestern Colorado and in other fields or basins along the route of its pipeline in Colorado, Utah and Wyoming.

31. Until its merger into El Paso, Pacific Northwest sold gas to distribution companies for resale in Washington, Oregon, Idaho, Utah and Colorado, and also sold directly to certain industrial consumers along the route of its pipelines. It also sold gas to other pipeline companies, Colorado Interstate Gas Company and Mountain Fuel Supply Company, such gas being delivered in Wyoming at points of interconnection of the respective pipeline systems.

32. Pacific Northwest was incorporated in 1949. In June 1954, the Commission issued to Pacific Northwest a certificate of public convenience and necessity to construct a pipeline from the San Juan Basin

along the western slope of the Rocky Mountains into Oregon and Washington to serve the Northwest area.

33. Before commencement of construction of its certificated line, Pacific Northwest on December 11, 1954, entered into an agreement with Westcoast Transmission Company Limited (herein called "Westcoast Transmission") for a supply of Canadian-produced gas of 300 million cubic feet per day to be imported into the United States by Pacific Northwest. Pacific Northwest obtained the necessary financing and commenced the construction of its pipeline system in May 1955. In November 1955, the Federal Power Commission issued a certificate of public convenience and necessity and other necessary permits to Pacific Northwest authorizing it to import the Canadian gas it had contracted for and to construct the necessary facilities for the importation and sale thereof.

34. On the same date that Pacific Northwest entered into its agreement with Westcoast Transmission to import Canadian gas, it entered into an agreement with El Paso whereby El Paso agreed to purchase 250 million cubic feet of gas per day at a point near Mountain Home, Idaho. The agreement of El Paso to purchase 250 million cubic feet of the 300 million cubic feet per day of Canadian gas which Pacific Northwest was committed to take from Westcoast Transmission made possible Pacific Northwest's commitment. Thereafter, in August 1955, El Paso and Pacific Northwest substituted new agreements whereby Pacific Northwest would sell to El Paso 50 million cubic feet per day of the Canadian gas to be delivered on an exchange basis in the San Juan Basin; Pacific Northwest had the right to require El Paso to take another 50 million cubic feet per day of Canadian gas. The Federal Power Commission also certifi-

cated these agreements in November 1955. The first deliveries of Canadian gas in Pacific Northwest's system were received in the fall of 1957.

35. Also on December 11, 1954, El Paso agreed to deliver to Pacific Northwest specified volumes of gas it had available due to temporary excess deliverability during the first five years of Pacific Northwest's operations, and Pacific Northwest agreed to repay El Paso with equivalent volumes of gas in succeeding years, which agreement was approved by the Federal Power Commission. This enabled Pacific Northwest to postpone substantial expenditures for the drilling of wells in the San Juan Basin, while still obtaining the early deliverability of the gas it needed. El Paso and Pacific Northwest further agreed to utilize their respective gathering systems in the San Juan Basin to take gas from each other's wells on an exchange basis, and thereby avoid needless duplication of gathering facilities.

36. Pacific Northwest, by virtue of its acquisitions in the San Juan Basin and other areas in the Rocky Mountains, had a large volume of gas reserves as yet undeveloped. In addition to this surplus of undeveloped reserves were the Canadian gas supplies which Pacific Northwest was under an obligation to take or pay for. With its relatively thin market in the Northwest, Pacific Northwest was in an excess gas reserve situation before and at the time of the stock acquisition.

37. Pacific Northwest's major reserves were covered by leases of acreage which it was required to develop in accordance with the terms of the leases or risk the loss of the acreage and the reserves contained therein. It lacked the resources effectively to develop its existing gas reserves or to acquire and develop new reserves.

38. Because of its financial problems, Pacific Northwest was not in a position to assist its distribution company customers to develop the market for natural gas in the Northwest. In seeking to increase its revenues, Pacific Northwest faced a dilemma in that the more it increased its rates, the less likely it would be to increase its sales.

39. In 1957, Pacific Northwest suffered an operating loss of $2,067,005. In contrast to predicted earnings of $23,700,000 for the years 1957–59 (rates of return of 5.78%, 8.14% and 8.33% for the years 1957, 1958 and 1959, respectively) upon which Pacific Northwest was certificated in 1954 and 1955 as an economically feasible project, the approximately $248,000,000 investment in the facilities of Pacific Northwest earned only $271,651 in 1958 and $3,619,971 in 1959.

EL PASO'S PURPOSE IN ACQUIRING CONTROL OF PACIFIC NORTHWEST

40. El Paso's purpose since the end of 1954 in seeking to acquire Pacific Northwest's assets or stock was to obtain additional gas supplies and reserves in conformity with admonitions of the Federal Power Commission and its staff, to add to its existing gas resources, particularly "dry" gas resources to balance its "residue" gas resources, in order to replace its existing gas sources as they were being exhausted in supplying its certificated markets and to enable it to serve its certificated markets in the future, and to those ends to acquire Pacific Northwest's gas reserves and gain access to gas producing areas in the Rocky Mountains and Canada. Accordingly, it acquired Pacific Northwest as heretofore found in Finding No. 5. Since the merger, El Paso has operated its facilities and Pacific Northwest's facilities as an integrated

natural gas company. There is no evidence that El Paso had any anticompetitive purpose in acquiring Pacific Northwest.

MARKETS OF EL PASO AND PACIFIC NORTHWEST IN THE WESTERN STATES

41. In California, Southern California Gas Company and Southern Counties Gas Company of California (herein jointly called "Southern California Companies") and Pacific Gas and Electric Company (herein called "PG&E"), in their efforts to sell natural gas within their respective service areas regulated by the California Public Utilities Commission, compete with companies, attempting to sell fuel oil to domestic, commercial and industrial customers.

42. PG&E has lost industrial customers to fuel oil, in 1961 lost some $5,000,000 in annual revenues to fuel oil, and considered it necessary to reduce its gas rates to industrial customers so as to attempt to hold its market against competition from fuel oil. The City of Los Angeles Department of Water and Power and Southern California Edison Company (herein called "Edison") each regularly uses fuel oil interchangeably with natural gas as boiler fuel to produce electric energy. Large industrial users are equipped for changeover from the use of gas to fuel oil, and vice versa. The cost of natural gas to domestic consumers is directly related to the use of natural gas for industrial purposes, the point at which competition with fuel oil is most vigorous.

43. The Southern California Companies in their efforts to sell natural gas compete with efforts to sell electricity by Edison and the City of Los Angeles Department of Water and Power in Southern California and by PG&E within part of PG&E's service area for the sale of electricity.

44. In Washington and Oregon, natural gas is in direct competition with fuel oil and electricity as a source of energy for house heating, cooking and water heating and as a fuel for industrial customers. Washington Natural Gas Company cannot compete with electricity for cooking and water heating alone but must secure house heating as well in order to compete.

45. Fuel energy, including electricity and fuel oil as well as natural gas, is a line of commerce.

46. Plaintiff has not attempted to prove its case on the basis of fuel energy as a line of commerce, and there is no evidence which shows that the acquisition and merger resulted in a substantial lessening of competition or a tendency to create a monopoly, or any reasonable probability thereof, in this line of commerce in any section of the country.

47. Exploration for and the production, transportation and sale of natural gas is a line of commerce.

48. From time to time since 1946, El Paso entered into long-term sales contracts with distribution companies whereby it agreed to sell and transport specified quantities of natural gas to those companies in the states of California, Nevada, Arizona, New Mexico and Colorado. Each sales contract under which deliveries are being made, including the price and the performance thereof, was authorized by a certificate of public convenience and necessity issued by the Federal Power Commission pursuant to Section 7(c) of the Natural Gas Act, which also authorized the construction and operation of the necessary facilities. Each gas sale arrangement with the California distribution companies was also subject to the approval of, and was approved by, the California Public Utilities Commission.

49. At January 1, 1957, El Paso had obligated itself to sell and deliver to the California distribution com-

panies approximately two billion cubic feet of natural gas per day by long-term supply contracts authorized by the Federal Power Commission and the California Public Utilities Commission. El Paso also was obligated to sell and deliver to distribution companies in the states of Arizona, New Mexico, Nevada and Colorado approximately 583 million cubic feet of gas per day as required by long-term supply contracts authorized by Federal Power Commission certificates.

50. It was the legal right and duty of El Paso to sell and transport the contracted and certificated quantities of natural gas and to operate and maintain the certificated facilities, and it continues to be the legal right and duty of El Paso to perform that service now, and in the future, under penalty of criminal sanctions prescribed in the Natural Gas Act, until authorized to abandon or discontinue the service, or any part thereof, by the Federal Power Commission under Section 7(b) of the Natural Gas Act.

51. At January 1, 1957, Pacific Northwest was authorized by the Federal Power Commission to sell, and was selling, natural gas in the states of Washington, Oregon, Idaho and parts of Wyoming, Utah and Colorado.

52. It was the legal right and duty of Pacific Northwest to sell natural gas in those states to the extent of its contractual commitments and up to the 645.2 million cubic feet per day certificated capacity of its pipeline facilities, which it had constructed pursuant to authority of certificates of public convenience and necessity issued by the Federal Power Commission. It continued to be the legal right and duty of Pacific Northwest to do so until the merger, and the legal right and duty continue, under penalty of criminal sanctions prescribed in the Natural Gas Act, until abandonment or discontinuation of the service in

whole or in part is authorized by the Federal Power Commission under Section 7(b) of the Natural Gas Act.

53. These segments of market demand served by El Paso and Pacific Northwest, respectively, were and are by law not subject to competition from others.

54. Prior to the merger, El Paso never sold or transported, or attempted to sell or transport, any natural gas in or for use in the states of Oregon, Washington or Idaho. There was and is no reasonable likelihood that El Paso ever would have sold or transported, or would have attempted to sell or transport, natural gas in or for use in any of those states had Pacific Northwest not been merged into El Paso.

55. Pacific Northwest never sold or transported, or attempted to sell or transport, any natural gas in or for use in the states of Texas, New Mexico, Arizona or Nevada. There was no reasonable likelihood that Pacific Northwest ever would have sold or transported, or would have attempted to sell or transport natural gas in or for use in any of those states.

56. In the state of Utah, commencing in 1956, Pacific Northwest sold gas from its pipeline running north along the eastern boundary of Utah to the Utah Gas Service Company, which supplies a few communities along the route of the Pacific Northwest line. These sales constituted four-tenths of 1% of its total sales in 1957. Commencing in 1957, Pacific Northwest also sold gas to Mountain Fuel Supply Company at a point in southwest Wyoming for use in the Salt Lake City area.

57. Sales of gas in Utah by El Paso's subsidiary, Utah Natural Gas Company, are made from gas reserves in the Clear Creek Field in Utah which are

relatively small and decreasing in availability, and there is little probability that Utah Natural would have any gas to dispose of in excess of that which it already has under contract to deliver to Mountain Fuel.

58. There has never been any reasonable likelihood that Utah Natural Gas Company would compete in the state of Utah for any other sales than its existing contract sales to Mountain Fuel, and there is no reasonable likelihood that it will do so in the future. There was and is no reasonable likelihood that El Paso itself ever would have sold or transported, or would have attempted to sell or transport, natural gas in or for use in Utah had Pacific Northwest not been merged into El Paso.

59. Other sales of natural gas by Pacific Northwest in Wyoming were principally to Colorado Interstate Gas Company, another interstate natural gas company. It also made insignificant industrial sales off its line. El Paso never sold or transported natural gas in the state of Wyoming prior to the acquisition. There has never been any reasonable likelihood of El Paso's competing or attempting to compete with Pacific Northwest in the sale or transportation of natural gas in or for use in Wyoming.

60. Both Pacific Northwest and El Paso made insignificant sales of natural gas in the state of Colorado prior to the merger; these sales were in different areas and were not competitive. There has never been any reasonable likelihood of either company's competing or attempting to compete with the other in the sale or transportation of natural gas in or for use in Colorado.

61. There is no evidence that the stock acquisition and merger have had the effect of substantially lessening competition or tending to create a monopoly in

the sale or transportation of natural gas to distribution companies or ultimate consumers in Washington, Oregon, Idaho, Utah, Wyoming or Colorado, the states in which Pacific Northwest performed certificated natural gas services prior to the merger, or in any combination of two or more of those states.

62. There is no evidence that the stock acquisition and merger had or have a reasonable probability of substantially lessening competition or tending to create a monopoly in the sale or transportation of natural gas to distribution companies or ultimate consumers in any of the states listed in Finding 61 above, or in any combination of two or more of those states.

63. The substitution of El Paso for Pacific Northwest as the supplier of natural gas in the Northwest states of Washington and Oregon has resulted in the extension of natural gas service in those states, and at lower rates than would otherwise have been practicable, and in the strengthening of competition with the alternative energy sources of electricity and fuel oil.

64. There is no evidence that the stock acquisition and merger have had the effect of substantially lessening competition or tending to create a monopoly in the sale or transportation of natural gas to distribution companies or ultimate consumers in Texas, New Mexico, Arizona or Nevada, or in any combination of two or more of those states.

65. There is no evidence that the stock acquisition and merger had or have a reasonable probability of substantially lessening competition or tending to create a monopoly in the sale or transportation of natural gas to distribution companies or ultimate consumers in any of the states listed in Finding 64 above, or in any combination of two or more of those states.

66. At the time of the stock acquisition, when El Paso was delivering approximately two billion cubic feet of natural gas per day to California, Pacific Northwest had never made any sale of natural gas in the State of California.

67. Since 1946, when El Paso entered into its first long-term sales contracts to sell natural gas to a distribution company in California, there have been only two purchasers of interstate natural gas in that state: PG&E and the Southern California Companies. (As indicated in Finding No. 41 above, the "Southern California Companies" are Southern California Gas Company and Southern Counties Gas Company. Both are wholly-owned subsidiaries of Pacific Lighting Corporation. The Southern California Companies have in the past made and are continuing to make purchases of natural gas jointly and are treated in these Findings as a single purchaser of gas in California.)

68. PG&E is and for many years past has been the only company distributing natural gas to the public in its gas service area in northern and central California, and the only company authorized to do so in that area under the laws of the State of California. PG&E is and was at all relevant times herein the only purchaser of interstate natural gas for resale within its gas service area. Within its electric service area, PG&E is also the only purchaser of natural gas for boiler fuel for generation of electric energy which it distributes and sells to the public. Accordingly, no sales of interstate natural gas have been made in the past or are likely to be made in the future in northern or central California, either for resale or for production of electric energy, except pursuant to contracts entered into by PG&E as purchaser.

69. The Southern California Companies are, and were at all relevant times, the only companies distributing natural gas to the public in their respective gas service areas in Southern California, and are the only companies authorized to do so in these areas under the laws of the State of California. The Southern California Companies are, and were at all relevant times, the only purchasers of interstate natural gas for resale within their said service areas, and no sales of interstate natural gas for resale have been made in the past or are likely to be made in the future for distribution in the service areas of the Southern California Companies except pursuant to contracts entered into by the Southern California Companies as purchasers.

70. PG&E and the Southern California Companies have at all times in the past received, and still are receiving, all interstate natural gas supplies at the border of the State. PG&E and the Southern California Companies have at all times in the past transmitted, and now transmit, all such interstate natural gas through main transmission lines owned respectively by them to the distribution centers in which they respectively distribute natural gas. All such main line transportation from the California border to the distribution centers and all supplies purchased and transmitted therein are subject to complete regulation by the Public Utilities Commission of the State of California, and no purchases of interstate natural gas can be made by either of the California buyers except with the consent and approval of the Public Utilities Commission of the State of California.

71. As a consequence of the foregoing, all purchases of interstate natural gas for resale in the State of California have been and will continue in the fore-

seeable future to be made only pursuant to purchase contracts entered into by one or the other or both of said California buyers, and only after certification of such contracts by the Federal Power Commission and after approval thereof by the Public Utilities Commission of the State of California.

72. Proposals to transport and sell interstate natural gas in the California market, including proposals of Pacific Northwest, proposed joint projects of El Paso and Pacific Northwest and proposals by El Paso itself, have been frustrated by the refusal of either or both of the California buyers of interstate natural gas to purchase the same.

73. PG&E and the Southern California Companies stand ready to purchase all available natural gas produced in California, and have purchased and will continue to purchase all such intrastate natural gas in preference to and priority over interstate supplies of natural gas.

74. Richfield Oil Corporation is currently selling 42 million cubic feet per day of natural gas from California fields to Southern California Edison Company on a firm basis under a 20-year contract.

75. In 1961, the intrastate natural gas consumed in California amounted to 31.5% of the State's total consumption of natural gas. Active exploration for additional supplies of natural gas is continuing in the State of California and reserves have been and are continuing to be discovered, and are likely to be discovered and developed in the future in amounts which have not been forecast in the evidence.

76. Industrial consumers in the State of California have been, and are being, furnished with large quantities of fuel oil which they use interchangeably with natural gas.

77. At the time of the commencement of this action, El Paso was the only out-of-state pipeline company suppling natural gas to California.

78. Since the commencement of this action, El Paso has ceased to be the only natural gas company supplying interstate natural gas to California.

79. Since the commencement of this action, the Southern California Companies in 1958 entered into a long-term purchase contract with Transwestern Pipeline Company, a new corporation organized by various producer interests, including Gulf Oil Corporation and Warren Petroleum Company. In pursuance of this contract, and in accordance with a certificate of public convenience and necessity granted by the Federal Power Commission and authorizing construction of a new pipeline at a cost of $191,000,000, Transwestern is presently delivering to the Southern California Companies 300 million cubic feet of gas per day through a pipeline which has an ultimate capacity of 640 million cubic feet per day.

80. Since the commencement of this action, Pacific Gas Transmission Company (an affiliate of PG&E) in 1960 constructed a pipeline at a cost of $133,000,000 to transmit Canadian natural gas supplies controlled by PG&E from the International Border to California, pursuant to a certificate of public convenience and necessity granted by the Federal Power Commission. This pipeline presently supplies approximately 415 million cubic feet of gas per day to PG&E, and has an ultimate capacity of one billion cubic feet per day. PG&E will utilize its unused Pacific Gas Transmission capacity before turning to other interstate sources. PG&E has failed to take any part of 200 million cubic feet of gas per day offered to it in 1958 by El Paso and may not ever call upon any portion of this supply.

81. Since the commencement of this action, the Southern California Companies have been exploring for natural gas reserves and have obtained leases on 59,000 acres of promising gas lands in the area of the Rocky Mountains which they intend to develop and utilize to serve their own system.

82. Since the commencement of this action, an agreement (the so-called "Pemex" project) was made between Edison and an affiliate of Tennessee Gas Transmission Company for the construction at a cost of over $177,000,000 of a pipeline system from west Texas through Mexico to Edison's generating plants in Southern California for the purpose of transporting to Edison over 450 million cubic feet of gas per day; of this amount 380 million feet per day would be Edison's gas obtained pursuant to gas purchase contracts from fields in south Texas, and the rest would be from Mexican fields.

83. Since commencement of this action, Colorado Interstate Gas Company agreed in 1958 to provide 200 million cubic feet of natural gas per day from the Panhandle-Hugoton field, and to release an additional 100 million cubic feet per day committed to it by Pacific Northwest prior to the stock acquisition, for the so-called "Rock Springs" project, which involves the proposed delivery of 400 million cubic feet per day to the Southern California Companies.

84. The projects referred to in Findings 82 and 83 above are pending before the Federal Power Commission upon applications for certificates of public convenience and necessity which have not yet been granted.

85. The industries and other consumers of natural gas in California were not and are not "heavily dependent" on El Paso for natural gas, as alleged in Paragraph 7 of the complaint, either at the time of

the commencement of this action or at any time subsequent thereto. El Paso has the right and power only to deliver the quantities of natural gas, a maximum of 2,155 million cubic feet per day, provided for by existing certificated gas sales contracts between it and the California distribution companies. El Paso has no right, and never has had, to sell or deliver any additional natural gas in or for use in the State of California. Additional interstate natural gas may be obtained at any time by the distribution companies which control the natural gas market in California from their own reserves, from their affiliates, from other natural gas companies, or from El Paso, pursuant to contracts which must be certificated by the Federal Power Commission and approved by the California Public Utilities Commission.

86. Market demand for natural gas in California has been estimated to grow at an annual rate of approximately 200 million cubic feet per day.

87. El Paso has no advantage over its competitors to supply future market demand for interstate natural gas in California or any part thereof, and in various respects is at a competitive disadvantage. In order to compete to supply such new demand, it would be necessary for El Paso to acquire new and additional supplies or reserves of natural gas and to make feasible arrangements to construct new pipeline facilities. The potential excess capacity of the pipeline facilities of Transwestern Pipeline Company remains unfulfilled and will offer substantial competition. Edison seeks extensive out-of-state gas supplies for its own utilization through the Pemex project of Tennessee Gas Transmission Company. The potential excess capacity of the pipeline facilities of PG&E's subsidiary, Pacific Gas Transmission Company, remains unfilled; another PG&E subsidiary has acquired ex-

tensive Canadian gas supplies for utilization by PG&E in California; and the Southern California Companies are exploring in the Rocky Mountains for reserves and supplies. To the extent that the California distribution companies own, control or acquire natural gas resources for and transmission facilities to California, there is no reasonable probability that El Paso will be able to make further sales in California or that Pacific Northwest, had it remained independent, would have been able to do so.

88. Since January 1, 1957, El Paso has made no sales or deliveries of natural gas to California under long-term contracts in excess of its commitments existing on that date.

89. In 1957, the intrastate production of natural gas in California constituted 41.9% of the State's consumption, and El Paso's certificated sales constituted 58.1%. In 1962, El Paso's certificated sales constituted 51% of the consumption of natural gas in California, and supplies from other sources, including intrastate production and other certificated supplies, constituted 49%. The volume of El Paso's certificated sales to the California distribution companies during July 1962, the latest recorded date, has also declined since July 1959.

90. In 1956, Pacific Northwest attempted to sell Canadian natural gas to Edison for use as boiler fuel. Edison, which was then obtaining gas on an interruptible basis from the Southern California Companies, was endeavoring to obtain a supply of natural gas on a firm basis. Edison's then demand was approximately 100,000,000 cubic feet of gas per day.

91. Pacific Northwest's proposal required construction of pipeline facilities to, and passing through, northern California and a sales contract of at least 300 million cubic feet of gas per day to support the

project. This proposal to sell and deliver 300 million cubic feet of Canadian gas per day to California under a contract with Edison was dependent upon the acquistion by Pacific Northwest of the necessary Canadian supplies and the willingness of PG&E and the Southern California Companies to participate and provide intrastate transportation facilities as well as to purchase the quantities of gas exceeding Edison's needs.

92. PG&E and the Southern California Companies rejected the proposal and refused to participate. It then became evident that it was impossible for Pacific Northwest to sell the natural gas in the California market.

93. Edison rejected Pacific Northwest's attempt to sell Canadian gas. El Paso had nothing to do with the collapse of Pacific Northwest's proposal to Edison.

94. The financial condition of Pacific Northwest was such that it is improbable that it could have succeeded in selling natural gas at that time in the California market.

95. In 1955, Edison had applied to the California Public Utilities Commission for an order requiring the Southern California Companies to sell firm gas to it, and the Commission had failed to take any action in the matter. The firm sale of natural gas to Edison as boiler fuel was regarded by the Federal Power Commission as an inferior use and not in the public interest; in 1959 it refused to grant El Paso a certificate of public convenience and necessity authorizing it to sell gas to Edison for such purpose even under the proposed arrangement in which the Southern California Companies shared.

96. The inability of Pacific Northwest to sell natural gas in California was demonstrated by the

lack of Canadian supplies available to Pacific Northwest to deliver to California. The evidence shows that neither Pacific Northwest, nor El Paso after the merger, was able to secure sufficient Canadian supplies to support a Canadian gas project to California.

97. There is no evidence that Pacific Northwest, had it remained as a separate and independent entity, could have in the future obtained a contract from the Southern California Companies, PG&E, or both, for a natural gas pipeline project to California.

98. Pacific Northwest, had it remained a separate and independent entity, could not in the future have acquired or arranged for the necessary gas supplies, obtained the requisite financing and built the necessary pipeline facilities to support a feasible interstate natural gas project to California.

99. There is no evidence that Pacific Northwest, had it remained as a separate and independent entity, could have put together an interstate natural gas project to serve California acceptable to the Federal Power Commission and the California Public Utilities Commission.

100. There is no evidence that Pacific Northwest, had it remained a separate and independent entity, had a reasonable likelihood of providing any substantial competition for the sale or transportation of natural gas in or for use in California or any part thereof, including Southern California.

101. Pacific Northwest did not have any reasonable likelihood as a separate and independent entity of providing any substantial competition in the future for the sale of or transportation of natural gas in or for use in the State of California or any part thereof, including Southern California.

102. The stock acquisition and merger have not had the effect of substantially lessening competition or tending to create a monopoly in the sale or transportation of natural gas for distribution or use in California or any part thereof, including Southern California.

103. The stock acquisition and merger have not had and do not have a reasonable probability of substantially lessening competition or tending to create a monopoly in the sale or transportation of natural gas for distribution or use in California or any part thereof, including Southern California.

104. The evidence does not support the plaintiff's contention that each of the following multi-state "areas" constitutes an appropriate or relevant section of the country for the purposes of this action:

(a) The "11-State area" consisting of California, Oregon, Washington, Idaho, Nevada, Arizona, New Mexico, Utah, Colorado, Wyoming and Texas; (b) the "10-State area" consisting of the "11-State area" less Texas; (c) the "8-State area" consisting of the "10-State area" less Colorado and Wyoming; and (d) the "Pacific Coast States" area consisting of the three coastal states of Washington, Oregon and California.

105. None of the "areas" listed in Finding 104 above constitutes an appropriate or relevant section of the country for the purposes of this action.

106. There is no state or area or section of the country, however defined, in which Pacific Northwest at any time was a substantial competitor of El Paso to sell or transport natural gas for distribution or use.

107. There is no state or area or section of the country, however defined, in which there was or is a reasonable probability that Pacific Northwest would

or could be an effective competitor of El Paso to sell or transport natural gas for distribution or use.

108. On the basis of all the evidence, there is no state or area or section of the country, however defined, in which the stock acquisition and merger have had the effect of substantially lessening competition or tending to create a monopoly in the sale or transportation of natural gas for distribution or use.

109. On the basis of all the evidence, there is no state or area or section of the country, however defined, in which the stock acquisition and merger had or have a reasonable probability of substantially lessening competition or tending to create a monopoly in the sale or transportation of natural gas for distribution or use.

PRODUCTION AND PURCHASE OF NATURAL GAS

110. Under the Natural Gas Act no person, including producers, may sell natural gas in interstate commerce for resale without obtaining a certificate of public convenience and necessity from the Federal Power Commission. The initial price and the other terms of any such sale are subject to approval by the Commission. Subsequent prices must not exceed what is just and reasonable as determined by the Commission.

111. Once natural gas is sold in interstate commerce in accordance with a certificate issued by the Commission, the reserves from which it is produced are dedicated to public service. The sale of such gas may not thereafter be discontinued irrespective of any contract provision unless the abandonment of such sale is authorized by the Federal Power Commission, under Section 7(b) of the Natural Gas Act, upon a finding that the reserves have been exhausted or that

the public convenience and necessity otherwise permits such abandonment.

112. Following the June 1954 decision of the United States Supreme Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, the Federal Power Commission commenced to exercise its regulatory powers over all sales by producers of natural gas in interstate commerce for resale, and to perform its duty to administer price provisions to ensure the lowest reasonable price.

113. On September 28, 1960, the Federal Power Commission established maximum prices in various areas of production in the United States for the sale of natural gas. All natural gas sold in interstate commerce for resale must be at a price not exceeding the area price in the absence of an order of the Commission authorizing a price in excess thereof as being in the public interest.

114. The Commission established a maximum area price of 13¢ per thousand cubic feet for all natural gas sold within the San Juan Basin, which is still in effect. No sales have been made in the San Juan Basin since that date in excess of 13¢ per thousand cubic feet. There is no evidence that any sale of natural gas in the San Juan Basin since 1960 has been made at any price below the area price.

115. Beginning in 1948, El Paso pioneered in the exploration and development of the "dry" gas reserves in the San Juan Basin in its efforts to explore for, purchase and otherwise acquire reserves and supplies of natural gas in various fields and basins.

116. During the years 1952, 1953 and 1954, Pacific Northwest likewise acquired or sought to acquire reserves of natural gas in the fields and basins in the area of the Rocky Mountains, including the San Juan Basin, in search of gas resources to support its proj-

ect for the Northwest states, application for the certification of which was pending before the Federal Power Commission. The gas reserves which Pacific Northwest acquired in the San Juan Basin by an assignment of leases from Phillips Petroleum Company, Sinclair Oil Company, Skelly Oil Company and other producers constituted the principal gas supply for the pipeline which the Commission certificated in June 1954. The portion of its gas supply which Pacific Northwest obtained along the projected route of its pipeline in Colorado and Wyoming could not alone have supported its project.

117. During the same period of time other interstate natural gas companies, including Southern Union Gas Company, Mountain Fuel Supply Company and Colorado Interstate Gas Company, were also acquiring or seeking to acquire gas reserves in the San Juan Basin and elsewhere in the area of the Rocky Mountains.

118. These acquisitions and efforts did not result in substantial competition between Pacific Northwest and El Paso, although in various instances offers to buy were made by the two companies to the same producers. The major producers from which Pacific Northwest obtained its reserves in the San Juan Basin were seeking to have their holdings connected with a new and unserved market, the Pacific Northwest states. El Paso and Pacific Northwest had different areas of interest in the San Juan Basin, El Paso's reserves being located principally in the western part, and Pacific Northwest's in the eastern part, of the Basin. Ninety to ninety-five percent of the gas supplies acquired by Pacific Northwest in the San Juan Basin were obtained without any competition whatever from El Paso.

119. After 1954 there was little or no competition between El Paso and Pacific Northwest respecting the acquisition of gas supplies and reserves in the San Juan Basin or elsewhere.

120. At the date of the acquisition, virtually all of the then known gas reserves in the San Juan Basin had been acquired under long-term contracts or lease assignments by El Paso, Pacific Northwest or Southern Union Gas Company, and had been dedicated to interstate natural gas service and therefore ceased to be available.

121. At the time of the acquisition, in addition to its reserves in the San Juan Basin and other fields in the area of the Rocky Mountains, Pacific Northwest had acquired Canadian supplies of natural gas under its contract with the Westcoast Transmission Company made in December 1954. As a result, see Findings 36 through 38 above, it had an oversupply of gas resources, much of which it was in no financial position to develop.

122. El Paso's acquisition of the stock of Pacific Northwest and the subsequent merger had no adverse effect on the producers in the San Juan Basin. Except for the substitution of El Paso as the purchaser under Pacific Northwest's gas purchase arrangements, there was no change in any of the terms and conditions, including the price provisions, under which the producers were selling their gas. None of the producer witnesses produced by the plaintiff testified as to any adverse effect.

123. There was no reasonable likelihood at the time of the stock acquisition that El Paso and Pacific would thereafter have competed with each other for reserves in the San Juan Basin or elsewhere in the area of the Rocky Mountains.

124. On the basis of all the evidence, the stock acquisition and merger did not substantially lessen competition or tend to create a monopoly in the exploration for, production or purchase of natural gas reserves in any area or section of the country.

125. On the basis of all the evidence, the stock acquisition and merger have not had and do not have a reasonable probability of substantially lessening competition or tending to create a monopoly in the exploration for, production or purchase of natural gas reserves in any area or section of the country.

OIL AND GAS PRODUCTS

126. The plaintiff has not attempted to make a case on its allegation in paragraph 15(g) of the complaint of adverse effect on competition in the production and sale of a "variety of products in the oil and gas industry, including extracted and refined products of oil and natural gas", and there is no evidence that the acquisition and merger resulted in a substantial lessening of competition or a tendency toward monopoly, or in any reasonable probability thereof, with respect to any or all of said products in any section of the country.

BENEFITS OF THE ACQUISITION AND MERGER

127. El Paso's financial resources enabled it, following the acquisition, to promote the market for natural gas in the Northwest area and to that end to provide extensive facilities and extensions which Pacific Northwest could not have undertaken for lack of funds. With the approval of the Federal Power Commission, laterals have been built from Portland, Oregon to Eugene and Grants Pass in Oregon, and various other facilities have been built in Oregon and Washington at a cost of some $18 million. In both

states El Paso has been able to maintain a rate structure more favorable to the public than Pacific Northwest could have maintained.

128. Competition of natural gas with electricity and fuel oil in the Northwest states of Washington and Oregon has been made more effective than it otherwise would have been.

129. The availability to El Paso, through its acquisition of Pacific Northwest, of the "dry" gas reserves in the Rocky Mountain fields and in Canada has improved El Paso's ability to take into its system "residue" gas from the Permian Basin. During 1956, 55.2% of the gas purchased and produced by El Paso was "residue" gas and 44.8% was "dry" gas. During 1960, after the merger, the ratio was 63.0 % "dry" gas and 37.0% "residue" gas.

130. The stock acquisition and merger benefited consumers in the areas served by El Paso, in which it is unlikely and improbable that Pacific Northwest would have been able to serve, by making available supplies and reserves needed to assure future public service in the fulfillment of El Paso's certificated market commitments.

CONCLUSIONS OF LAW

As its conclusions of law from the foregoing facts found, this Court does further find as follows:

That the acquisition by El Paso Natural Gas Company of the common stock of Pacific Northwest Pipeline Corporation and the merger of the latter corporation into the former have not had, and there is no reasonable probability that they will have, the effect of substantially lessening competition or tending to create a monopoly in any line of commerce in any section of the country.

Wherefore, it is ordered, adjudged and decreed that this action be and the same is hereby dismissed.

Dated: November 20, 1962.

(S) WILLIS W. RITTER,
Chief Judge of the United States
District Court for the District
of Utah, Central Division.

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